



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

October 9, 2003

Ms. Denise Hays
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2003-7178

Dear Ms. Hays:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189132.

The Dripping Springs Independent School District (the "district"), which you represent, received a request for information relating to a specified docket number, including attorney fee billing statements relating to the deposition of a named individual. You inform us that the district will release some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information contained in a governmental body's attorney fee bills must be released under section 552.022(a)(16), unless the information is expressly confidential under other law. The district claims exceptions to disclosure under sections 552.103, 552.107, and 552.111. We note, however, that these are discretionary

exceptions to public disclosure that protect the governmental body's interests and may be waived.¹ As such, sections 552.103, 552.107, and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. The district also raises section 552.101 of the Government Code in conjunction with the attorney-client and attorney work-product privileges.² This office has concluded, however, that section 552.101 does not encompass discovery privileges.³ Therefore, the district may not withhold any of the submitted information under sections 552.103, 552.107, or 552.111 or under its assertions of the attorney-client and attorney work product privileges under section 552.101.

We note, however, that the submitted information comes within the scope of the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g. FERPA is incorporated into chapter 552 of the Government Code under section 552.026. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 of the Government Code provides that chapter 552

does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

We conclude that the submitted information consists of education records that are subject to FERPA and may only be released in accordance with the federal law. In this instance, the requestor is an attorney for the parents of the student to whom the submitted information

¹*See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 630 at 4 (1994) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 may be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived).

²Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

³*See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

pertains. The parents of a minor student have a right of access under FERPA to information relating to the student. *See* 20 U.S.C. § 1232g(a)(1); 34 C.F.R. § 99.10. Accordingly, if the parents of the student to whom the submitted information pertains have provided the district with written consent to release to their attorney information relating to the student, then the requestor may exercise the parents' right of access to this information under FERPA. Otherwise, all of the submitted information must be withheld from the requestor under FERPA.

In light of our conclusions under FERPA, we also must consider the district's claims under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. The Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Ordinarily, FERPA prevails over an inconsistent provision of state law. *See Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 at 3 (1985). However, the Family Policy Compliance Office of the United States Department of Education has informed this office that a parent's right of access under FERPA to information about the parent's child does not prevail over a school district's right to assert the attorney-client and attorney work product privileges. Therefore, in the event that the requestor has a right of access to the submitted information under FERPA, we next consider whether the district may withhold any of the submitted information under Texas Rule of Evidence 503 or Texas Rule of Civil Procedure 192.5.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You have marked portions of the requested attorney fee bills that you claim are protected by the attorney-client privilege. You inform us that the information at issue reveals the substance of communications between attorneys for and representatives of the district. You state that these communications occurred in the course of the rendition of professional legal services and were intended to be confidential. You indicate that the district has maintained the confidentiality of the communications. We note that you have not identified several of the individuals who were involved in communications that you claim are privileged. Therefore, we are unable to conclude that communications involving those individuals come within the scope of rule 503(b)(1). With regard to the remaining information that you claim is protected by the attorney-client privilege, we have marked the communications that the district may withhold under Texas Rule of Evidence 503.

An attorney’s work product is confidential under Texas Rule of Civil Procedure 192.5. Rule 192.5 defines work product as consisting of:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). Accordingly, in order to withhold attorney work product from disclosure under rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. Information that meets the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You also contend that portions of the submitted attorney fee bills are protected by the attorney work product privilege. You state that these documents contain information relating to legal services that were provided to the district in connection with pending litigation. You assert that this information reflects the mental impressions, conclusions, or legal theories of the district’s attorneys. You also inform us that this information has only been revealed to attorneys for and representatives of the district. Based on your representations and our review of the information that you claim is attorney work product, we have marked the information that the district may withhold under Texas Rule of Civil Procedure 192.5.

In summary, the submitted information is confidential in its entirety under FERPA. If the parents of the student to whom the submitted information pertains have provided the district with written consent to release this information to the requestor, then the requestor may exercise the parents’ right of access to this information under FERPA. In the event that the requestor has a right of access to the submitted information under FERPA, the district may withhold the marked portions of the information that are confidential under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. If the district does not have written consent to release the submitted information to the requestor, then the district must withhold all of this information under FERPA.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

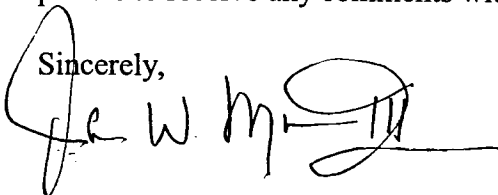
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III", with a stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 189132

Enc: Submitted documents

c: Ms. Elaine B. Roberts
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(w/o enclosures)